

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 19, 2008 Session

STATE OF TENNESSEE v. JASON J. MATTHEWS

**Direct Appeal from the Circuit Court for Wayne County
No. 13702 Robert Holloway, Judge**

No. M2007-01755-CCA-R3-CD - Filed August 5, 2009

The defendant, Jason J. Matthews, was convicted of second degree murder, a Class A felony, and sentenced to twenty-five years in the Tennessee Department of Correction as a Range I, standard offender. On appeal, he raises eight issues: 1) whether the evidence was sufficient to support the conviction; 2) whether there was prosecutorial misconduct; 3) whether the trial court erred in determining that the testimony of the defendant's wife did not violate the marital communication privilege; 4) whether the trial court erred in admitting a statement made by the defendant's wife in violation of the Confrontation Clause; 5) whether the trial court improperly instructed the jury; 6) whether the trial court erred in allowing the State to introduce autopsy photographs into evidence; 7) whether the trial court erred in sentencing the defendant; and 8) whether the trial court erred in not granting the defendant's motion for change of venue. After careful review, we affirm the judgments from the trial court on all issues except the defendant's sentencing. The defendant's maximum sentence runs afoul of *Blakely* and its progeny; thus, the defendant's sentence is set at twenty-two years.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

J. Daniel Freemon, Lawrenceburg, Tennessee, for the appellant, Jason J. Matthews.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and J. Douglas Dicus and Patrick Butler, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The defendant was indicted in February 2005 for the 1993 second degree murder and especially aggravated robbery of Marty Dixon. The defendant filed a motion to quash a subpoena

for his wife on the ground that spousal privilege barred her testimony. The trial court denied that motion by order dated February 22, 2006.

On February 21, 2006, the State filed a motion to exclude consideration of lesser included offenses which were barred by the statute of limitations. The trial court granted that motion on March 1, 2006, but noted that, should the defendant choose to waive the statute of limitations at any time during the course of the trial, he would charge these lesser included offenses.

The defendant was found guilty by a jury of second degree murder and not guilty of especially aggravated robbery. He was subsequently sentenced to twenty-five years in the Department of Correction.

Facts

The defendant and two friends were driving around the back roads of Wayne County on the night of the crime while consuming alcohol and cocaine. Late in the evening, they parked along one of the roads, and the victim, who was on his way home, spotted the truck. The two men with the defendant testified that the victim stopped around 3:00 or 3:30 a.m. on March 14, 1993. They testified that the victim approached the truck and inquired who was in the truck and why they were stopped there. One of the men with the defendant testified that the victim was in no way threatening or provocative in his behavior. In fact, the victim knew one of the men with the defendant.

The man that knew the victim said that he got out of the truck to urinate, and the victim was teasing him and "cutting up." The other witness testified that he stayed in the truck the entire time. The man that knew the victim testified that the defendant got out of the truck, grabbed the victim from behind, and began to pull him away from the vehicle. He said that he never saw a knife but did see the defendant make stabbing motions while the victim tried to retreat. The defendant pursued the victim and left the witness' line of sight.

The defendant returned to the truck after approaching the open window of the victim's car. The defendant got back into the truck, and one witness observed the defendant with a wallet. The defendant told the men that he had injured his hand and that the victim was not "alright."

The victim's body was discovered the next day by his uncle in a ditch along the road. He contacted the Sheriff's office. The Investigator for the Sheriff's office testified that the victim's body was covered in stab wounds and that his intestines were outside his body. The authorities questioned another suspect but never found evidence to link anyone else to the crime.

The doctor that conducted the autopsy testified that the victim died as a result of multiple stab wounds and incisions to the chest and abdomen. He said that he counted twenty knife wounds on the body, including incisions on the head, neck, chest, right hand, armpit, and left forearm. The doctor concluded that the wounds to the victim's hand and forearm were likely defensive wounds that were sustained when the victim attempted to use his hands to shield himself from the stabbing.

He opined that the victim's death resulted from the cumulative effect of the wounds and the resulting blood loss.

The defendant told a number of people about the murder. He told them that he had been using cocaine and drinking when the victim approached their vehicle and said that he killed the victim because he asked questions about the cocaine. One person told the defendant he should turn himself in for the crime, but the defendant laughed at the suggestion.

The two men with the defendant during the murder said that they kept the secret because they were concerned for their families. The defendant later confessed to his wife that he had committed the crime. He told her that he "gutted" the victim over cocaine and that, if she told anyone, she would end up like the victim. They were later divorced, but she kept the secret out of fear for herself and their children.

An agent with the Tennessee Bureau of Investigation testified that he became involved in the investigation in 1995 but was unsuccessful in solving the case at that time. However, he said that in February of 2005, he received information that led him to focus on the defendant. His investigation led him to question both of the men with the defendant the night of the murder, and they both provided information that the defendant murdered the victim. After the defendant was indicted, his current wife provided a statement to the agent regarding information the defendant had told her about the murder. She said that she confronted her husband after the indictment, and he confessed to her.

Analysis

The defendant first argues that the evidence was not sufficient to support his conviction. When an accused challenges the sufficiency of the convicting evidence, this court reviews the evidence in the light most favorable to the State in determining whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979); *State v. Carter*, 121 S.W.3d 579, 588 (Tenn. 2003). A defendant challenging the sufficiency of the proof has the burden of illustrating to this court why the evidence is insufficient to support the verdict returned by the trier of fact in the original case. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992); *State v. Freeman*, 943 S.W.2d 25, 29 (Tenn. Crim. App. 1996). This court will not disturb a verdict of guilt unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Tenn. R. App. P. 13(e); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

In determining the sufficiency of evidence, this court does not reweigh or reevaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Blanton*, 926 S.W.2d 953, 958 (Tenn. Crim. App. 1996). On appeal, the State is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn therefrom. *Tuggle*, 639 S.W.2d at 914. Once a verdict is approved by the trial court, it accredits the testimony of the State's

witnesses and resolves all conflicts in favor of the State. *State v. Hatchett*, 560 S.W.2d 627, 630 (Tenn. 1978).

Here, the jury convicted the defendant of second degree murder. Second degree murder is defined as the knowing killing of another. T.C.A. § 39-13-210(a) (2005). A person acts knowingly with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result. T.C.A. § 39-11-106(20) (2005). Thus, a person commits second degree murder when he is aware that the result of his conduct is reasonably certain to cause the killing of another, and his conduct does indeed result in the killing of another.

Specifically, the defendant argues that he should not have been convicted of murder because there was no evidence of malice presented at trial. However, the State correctly argues that malice is no longer an element of second degree murder and that it was not an element of the crime in 1993, when the murder occurred. *See State v. Williams*, 38 S.W.3d 532, 538 (Tenn. 2001). Therefore, the absence of malice does not depreciate what would have been second degree murder into voluntary manslaughter. *Id.* The essential element that now distinguishes the two offenses is whether the killing was committed “in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” *Id.* (quoting T.C.A. § 39-13-211(a)).

The evidence produced at trial did not show that the defendant was provoked. One eyewitness testified that the victim was not threatening or provocative and that the defendant grabbed the victim from behind. The eyewitness also testified that the victim was attempting to retreat and was not fighting back. The jury’s verdict accredits the witness’ testimony and resolves any inconsistencies in favor of the State. *See Hatchett*, 560 S.W.2d at 630. The defendant is not entitled to any relief on this issue.

The defendant also argues that the State engaged in misconduct during closing argument. The State argues that the defendant did not offer a contemporaneous objection at trial to the comments, which results in a waiver of the issue. Our review of the record reflects that the defendant did not object during the State’s closing argument. Rather, the record shows that the State objected during the closing argument of the defendant. During the State’s objection, counsel for the defendant stated that what he was doing was no different than what the State did during their closing argument.

The test for determining whether prosecutorial misconduct based on improper comments amounts to reversible error is whether the conduct was so improper or the argument so inflammatory that it affected the verdict. *State v. Reid*, 164 S.W.3d 286, 344 (Tenn. 2005); *Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965); *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003); *State v. Seay*, 945 S.W.2d 755, 763 (Tenn. Crim. App. 1996). In assessing whether comments made by the prosecution are so inflammatory or improper as to affect the verdict, the court must consider five factors:

- 1) the conduct complained of viewed in the context and the light of the facts and circumstances of the case;
- 2) the curative measures undertaken by the court and the prosecution;
- 3) the intent of the prosecutor in making the improper statements;
- 4) the cumulative effect of the improper alleged conduct and any other errors in the record; and
- 5) the relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

We have previously observed that there are five generally recognized areas of prosecutorial misconduct related to argument: 1) It is unprofessional conduct for the prosecutor to intentionally misstate the evidence or mislead the jury as to the inferences it may draw; 2) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant; 3) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury; 4) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict; and 5) It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge. *Goltz*, 111 S.W.3d at 6.

Specifically, the defendant objects to the prosecution's mentioning the victim's defensive wounds. However, the record reflects that the prosecution accurately stated the location of the victim's wounds and merely asked the jury to consider the significance of these locations. The doctor that performed the victim's autopsy testified that his opinion was that the wounds on the victim's hands and arms were consistent with the definition of defensive wounds. After considering the five factors, it is not apparent from the record that the prosecution engaged in any misconduct, therefore, the defendant is not entitled to any relief on this issue.

Next, the defendant contends that the trial court erred in allowing his wife to testify because the spousal privilege barred her testimony. In a civil proceeding, confidential communications between spouses are privileged and are, thus, inadmissible if either spouse objects. T.C.A. § 24-1-201(b)-(c) (2005). However, in a criminal proceeding, a marital confidential communication may only be privileged if several factors are met. To determine that a communication between spouses is confidential and, thus, subject to the marital communications privilege, a trial court must find that all of the following four conditions exist:

- A) The communications originated in a confidence that they will not be disclosed;
- B) The element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties;
- C) The relation must be one which, in the opinion of the community, ought to be sedulously fostered; and

- D) The injury to the relation by the disclosure of the communications outweighs the benefit gained for the correct disposal of litigation.

T.C.A. § 24-1-201(c)(1) (2005). This court has previously held that a communication not intended to be confidential is not privileged. *State v. Price*, 46 S.W.3d 785, 800 (Tenn. Crim. App. 2000); *Burton v. State*, 501 S.W.2d 814, 819 (Tenn. Crim. App. 1972). This court must defer to the lower court's findings of fact relative to the existence or nonexistence of the four factors unless the evidence preponderates to the contrary. *State v. Winters*, 137 S.W.3d 641, 662 (Tenn. Crim. App. 2003).

Here, the defendant contends that the trial court erred in allowing the State to introduce testimony from his wife because the court misconstrued the timing for consideration of the elements of confidentiality. The trial court found that any element of confidentiality was not essential to the maintenance of the relationship between the defendant and his wife and that any injury resulting from the disclosure of this confidence would not outweigh the benefit gained through its disclosure. The defendant's wife testified that she told the Tennessee Bureau of Investigation agent that the defendant confessed to her. She said that she told the agent about the confession while she was separated from the defendant and they were undergoing divorce proceedings. She further testified that they had later reconciled and had no current plans to divorce. The wife testified that the defendant knew of her statements to the agent before they reconciled.

Tennessee Code Annotated section 24-1-201(c)(1) requires that all four factors exist before a conversation will be subject to the marital communication privilege. Factor (A) focuses on the expectation of the communicating spouse at the time of the communication, whereas assessment for the presence of factors (B), (C) and (D) must be done from the facts as they exist at the time of the trial court's ruling. *State v. Mitchell*, 137 S.W.3d 630, 638 (Tenn. Crim. App. 2003), *perm. app. denied* (Tenn. 2003). If the privilege is recognized relative to a given communication, it is inadmissible upon objection of either spouse. T. C. A. § 24-1-201(c)(2) (2000). *State v. Winters*, 137 S.W.3d at 662.

The defendant and his wife were still living together during the time that he told his wife some of the circumstances surrounding the murder. The defendant's wife testified that the conversation was intended to be in confidence. The State did not present evidence to the contrary. However, the trial court found that the couple's relationship had actually improved since the defendant became aware that his wife had related the details of his confession to the Tennessee Bureau of Investigation and, therefore, did not satisfy parts (B) and (D) of the test. That she did not expressly state that her testimony would cause significant injury to their marriage is beside the point. Her testimony should be considered confidential and compliant with the requirements of Tennessee Code Annotated section 24-1-201 (c). The State's use of the wife's testimony would aid in the defendant's being convicted of murder. The defendant's conviction and twenty-five-year prison sentence were going to be destructive of the marriage. However, because the defendant made similar statements to other witnesses and because of the other evidence at trial, any error caused by the admission of the wife's statements would be harmless.

Next, the defendant argues that the trial court also erred in admitting the statement made by his wife to the Tennessee Bureau of Investigations agent because it violates the Confrontation Clauses of both the United States and Tennessee Constitutions pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). However, the record reveals that the defendant's wife was present and testified at trial. The defendant cross-examined her at trial about her statement. Where a defendant has the opportunity at trial to confront the declarant of a statement used against him, there can be no confrontation problem. *Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. at 1369 (citing *California v. Green*, 399 U.S. 149, 162 (1970)). The defendant is not entitled to relief on this issue.

Next, the defendant argues that the trial court erred by failing to charge the jury on certain lesser included offenses and required waiver of the statute of limitations. The State argues that the trial court properly instructed the jury on the applicable lesser included offenses not barred by the statute of limitations. The record reflects that the trial court stated that the defendant needed to waive the statute of limitations for certain lesser included offenses before it could instruct the jury on them, but the defendant did not waive his affirmative defense of statute of limitations. The trial court instructed the jury on the lesser included offenses of voluntary manslaughter, reckless homicide, and criminally negligent homicide.

The trial court has a duty, in criminal cases, to fully instruct the jury on the principles of law relevant to the issues raised by the evidence. *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999); *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986); *State v. Elder*, 982 S.W.2d 871, 876 (Tenn. Crim. App. 1998). The court must instruct the jury on those principles closely and openly connected with the facts before the court which are necessary for the jury's understanding of the case. *Elder*, 982 S.W.2d at 876. Because questions of the propriety of jury instructions are mixed questions of law and fact, the standard of review is de novo, with no presumption of correctness. *State v. Smiley*, 38 S.W.3d 521, 524 (Tenn. 2001); *State v. Rush*, 50 S.W.3d 424, 427 (Tenn. 2001).

By convicting the defendant of second-degree murder, the jury determined that the proof was sufficient to establish all the elements of that offense beyond a reasonable doubt. By finding the defendant guilty of the highest offense to the exclusion of the lesser offenses of voluntary manslaughter, reckless homicide, and criminally negligent homicide, the jury necessarily rejected all other lesser offenses. See *State v. Williams*, 977 S.W.2d 101, 106 (Tenn. 1998). Any error that might have occurred due to the trial court's not instructing on the time-barred lesser included offenses would amount to harmless error beyond a reasonable doubt because the jury's verdict of guilt on the greater offense of second degree murder and its disinclination to consider the lesser included offenses that were instructed demonstrates that it would not have returned a verdict on any omitted lesser included offenses. That the jury did not return a verdict of guilty on one of the charged lesser included offenses indicates their certainty of the defendant's guilt of the greater offense. Because the jury convicted the defendant of the greater offense of second degree murder and not one of the instructed lesser included offenses, we do not reach the defendant's issue of whether the trial court should have instructed the lesser included offenses that were barred by the statute of limitations. The defendant, on this record, cannot show any prejudice.

Next, the defendant argues that the trial court erred in admitting autopsy photographs of the victim into evidence. The defendant contends that the photographs were more prejudicial than they were probative and that they should not have been admitted pursuant to Tenn. R. Evid. 403. The trial court is entitled to broad discretion when admitting evidence at trial. The trial court's ruling on the admission of evidence may only be disturbed upon a showing of an abuse of discretion. *State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004) (citing *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997)). The trial court's exercise of discretion may not be reversed unless the court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997).

For evidence to be admissible, it must be relevant. Tenn. R. Evid. 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Tenn. R. Evid. 401. Relevant evidence may be excluded by the trial court if its probative value is substantially outweighed by the danger of unfair prejudice. Tenn. R. Evid. 403. The exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used only sparingly, and persons seeking to exclude evidence that would otherwise be admissible and relevant have a significant burden of persuasion. *State v. James*, 81 S.W.3d 751, 757-58 (Tenn. 2002). Tennessee courts have followed a liberal policy of allowing photographs into evidence in both civil and criminal cases. *State v. Morris*, 24 S.W.3d 788, 810 (Tenn. 2000) (citing *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978)). Even the most gruesome and horrifying photographs of a corpse are admissible in a murder prosecution if they are relevant to issues on trial. *State v. Banks*, 564 S.W.2d 947, 950-51.

Here, the trial court determined that the autopsy photographs were relevant evidence. The State argued at trial that the photographs were necessary to corroborate the witness' testimony that the defendant confessed that he "gutted" his victim. One of the photographs depicts the victim's intestines protruding outside of his abdomen. The State also argued that the photographs of the victim's body were probative of the question of self-defense. The wounds depicted in the pictures of the victim contradicted the defendant's theory of self-defense. During the testimony of the medical examiner, the trial court required a redaction of one photograph because it was graphic and not the subject of the testimony. The record reflects that the photographs introduced were probative of the facts in issue at trial, and the trial court acted within its discretion in admitting the photographs.

Next, the defendant argues that the trial court erred in determining the applicable factors for enhancing the defendant's sentence. The conduct underlying the defendant's convictions occurred prior to the amendments to the Criminal Sentencing Reform Act. Prior to 2005, the Criminal Sentencing Reform Act set forth a "presumptive sentence" to be imposed within an applicable range created by the Sentencing Act of 1989. A trial court "could not increase a defendant's sentence above the presumptive sentence except upon the application of statutory enhancement factors." *State v. Gomez*, 239 S.W.3d 733, 739 (Tenn. 2007). If the trial court determined that statutory enhancement factors applied, *see* Tenn. Code Ann. § 40-35-114 (2003), the trial court had the authority to increase the presumptive sentence up to the maximum within the range, *see id.* § 40-35-

210(d); *State v. Carter*, 254 S.W.3d 335, 342 (Tenn. 2008). The weight applied by the trial court to any enhancement and mitigating factors was left to the trial court's discretion. *Carter*, 254 S.W.3d at 342 (citing *Gomez*, 239 S.W.3d at 739-40).

After the decision in *Blakely v. Washington*, 542 U.S. 296 (2004), the Tennessee legislature amended the Criminal Sentencing Reform Act in 2005. The General Assembly amended Tennessee Code Annotated section 40-35-210(c) to state:

- (c) The court shall impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:
 - (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
 - (2) The sentence length within the range should be adjusted, as appropriated, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c) (2006).

Prior to the 2005 amendments, the 1989 Sentencing Act stated that “[t]he presumptive sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors.” T.C.A. § 40-35-210(c) (2003). Additionally, the prior statute required, “[s]hould there be enhancement and mitigating factors for a Class A felony, the court must start at the midpoint of the range, enhance the sentences within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors.” *Id.* § 40-35-210(e). The previous act also mandated “[w]henever the court imposes a sentence, it shall place on the record either orally or in writing what enhancement or mitigating factors it found[.]” *Id.* § 40-35-210(f).

The Sentencing Act provides that, “when reviewing sentencing issues raised [by a defendant] pursuant to [this section], including the granting or denial of probation and the length of sentence, the appellate court shall conduct a *de novo* review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-35-401(d); *see also id.* § 40-35-402(d).

Our review of the record reflects that the trial court applied enhancement factors that relied

on factors not found by a jury, however, the trial court also applied the enhancement factor concerning the defendant's previous history of criminal convictions. Under *Blakely* and its progeny, "the trial court's application of the enhancement factor for a previous history of criminal convictions does not offend the Sixth Amendment." *State v. Gomez*, 239 S.W.3d at 740.

During the sentencing hearing, the trial court noted the defendant's history of criminal convictions. The record contains the presentence report revealing sixteen criminal convictions. In his brief, the defendant states that these convictions were for traffic offenses that were dismissed. Twelve of the convictions were driving related. The defendant was convicted of misdemeanor possession of marijuana in 1994, passing a worthless check in 1996, domestic assault in 1998, and passing a worthless check in 2000. Though these offenses were misdemeanors, they do justify some enhancement in sentencing under the statute. The 1994 conviction was for drugs which played a role in the present conviction. The 1998 conviction for assault is also relevant to the present conviction. However, the prior convictions do not alone justify the maximum sentence imposed of twenty-five years. A sentence of twenty-two years, two years above the presumptive sentence, is more appropriate based on the presence of the applicable enhancement factor. Therefore, the defendant's sentence is set at twenty-two years pursuant to *Blakely* and its progeny.

Finally, the defendant argues that the trial court erred in denying his motion for a change of venue. The defendant filed a motion for a change of venue on August 29, 2005, and alleged that potential jurors could have been prejudiced by the media coverage due to the length of time the case remained unsolved. A trial court may grant a change of venue if it appears that "due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had." Tenn. R. Crim. P. 21(a). A motion for a change of venue is an issue for the sound discretion of the trial court, and this Court will reverse a trial court's ruling only upon a clear showing of an abuse of that discretion. *State v. Howell*, 868 S.W.2d 238, 249 (Tenn. 1993); *State v. Hoover*, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979). The fact that jurors have been exposed to pretrial publicity alone will not warrant a change of venue. *State v. Mann*, 959 S.W.2d 503, 531-32 (Tenn. 1997). Similarly, a mere showing of extensive pretrial publicity does not create a presumption of prejudice. *State v. Stapleton*, 638 S.W.2d 850, 856 (Tenn. Crim. App. 1982). In fact, jurors may possess knowledge of the facts of the case and may still be qualified to serve on the panel. *State v. Bates*, 804 S.W.2d 868, 877 (Tenn. 1991). The test is whether the jurors who actually sat on the panel and rendered the verdict and sentence were prejudiced by the pretrial publicity. *State v. Crenshaw*, 64 S.W.3d 374, 386 (Tenn. Crim. App. 2001); *State v. Kyger*, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). For there to be a reversal of a conviction based on a claim that the trial court improperly denied a motion for a change of venue, the "defendant must demonstrate that the jurors who actually sat were biased or prejudiced against him." *State v. Evans*, 838 S.W.2d 185, 192 (Tenn. 1992).

Here, the defendant has not demonstrated any actual bias or prejudice on the part of any juror that actually sat during his trial. His argument is merely speculation that there might have been bias. He has not provided any references to specific portions of jury selection, voir dire, or any part of the trial to support his argument. See T.R.A.P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b). Therefore, the

defendant is not entitled to relief on this issue.

Conclusion

Based on the foregoing and the record as a whole, we affirm the judgment from the trial court on all issues except sentencing. We conclude that *Blakely* and its progeny do not allow the trial court to enhance the defendant's sentence based on factors not found by a jury. The defendant's maximum sentence runs afoul of *Blakely* because the defendant's prior criminal convictions alone are not sufficient to justify the trial court's enhancement to the maximum sentence. Therefore, the defendant's sentence is set at twenty-two years.

JOHN EVERETT WILLIAMS, JUDGE